Supreme Court, U.S.
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No. 03 349

In The
Supreme Court of the United States

JACK THWEATT,
on behalf of himself and all others similarly situated,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The respondent fired the petitioner as part of a forced ranking and termination process in which a disproportionate number of the respondent's employees receiving low rankings were at least 40 years old. The petitioner alleged that the rankings were not based on reasonable business factors but on an arbitrary model for categorizing employees. The court of appeals rejected the petitioner's claim on the ground that the Age Discrimination in Employment Act of 1967 "does not include liability for disparate impact claims." The question presented is:

Whether a disparate impact method of proving age discrimination is available to plaintiffs suing under the Age Discrimination in Employment Act of 1967.

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OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-3a) is unreported, but is expressly based on the same court's earlier, reported decision in *Adams v. Florida Power*, 255 F.3d 1322 (CA11 2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002). The judgment of the district court (App., *infra*, 4a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 623(a) & (f)(1), 626(f)(1) are reprinted at App., *infra*, 6a-12a. The relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(2), are reprinted at App., *infra*, 12a-16a. The relevant portions of the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d)(1), are reprinted at App., *infra*, 16a-17a.

STATEMENT

The petitioner, Jack Thweatt, was a 47-year-old EDS employee when he received a low ranking within his job code and was fired as part of a rolling reduction-in-force. App., *infra*, 21a-22a, 30a. He sought to assert disparate

impact age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA) on behalf of a proposed class of older workers that EDS's ranking model had adversely affected. *Id.* at 22a-25a. The district court dismissed his complaint on the basis of the blanket rule in *Adams v. Florida Power*, 255 F.3d 1322 (CA11 2001), *cert. dismissed as improvidently granted*, 535 U.S. 228 (2002), that the ADEA does not under any circumstances permit disparate impact claims, App., *infra*, at 4a-5a, and the court of appeals affirmed on the same basis, *id.* at 2a-3a.

On writ of certiorari, *Adams* facially presented the Court an important federal question that had divided the circuits for a number of years—whether disparate impact claims are actionable under the ADEA. But the Court dismissed the writ as "improvidently granted" after an oral argument in which some members of the Court indicated the case might not be appropriate for deciding the disparate impact question because the *Adams* plaintiffs were challenging the general statistical result of a reduction-in-force, rather than a specific employment practice. For instance, Justice Ginsberg said: "[Y]ou don't come to us with any rule, standard, practice. You just say reduction in force." *Adams v. Florida Power*, 2002 WL 483467 *7 (oral argument transcript). The clear conflict among the circuits that preceded certiorari in *Adams* remains unresolved.

The petition in this case presents the same core legal question that *Adams* presented, but differs factually in one critical respect. The petitioner challenges a specific employment practice causing an adverse disparate impact on older workers: EDS's subjective and forced ranking model for categorizing its employees.

A. The ADEA: Its Language, Legislative History and Pre-*Hazen* Caselaw

Correct construction of the ADEA is aided by an understanding of its language, legislative history, and caselaw arising before *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993)—as well as by the amendments to the ADEA imported through the Older Workers Benefit Protection Act of 1990 (OWBPA).

In a 1965 report submitted to Congress two years before enactment of the ADEA, the Secretary of Labor stated that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965). Congress subsequently recognized that "older workers find themselves disadvantaged in their efforts to retain or regain employment, that arbitrary age limits and certain other practices may work to the disadvantage of older persons." H.R. Rep. No. 90-805, 90th Cong. 1st Sess. (1967). The ADEA was then enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.,* 513 U.S. 352, 357 (1995).

The express prohibitions of the ADEA make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age,"

29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). As the Court has acknowledged, there "are important similarities between" the ADEA and Title VII of the Civil Rights Act, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). A noted statutory difference between the ADEA and Title VII, however, is that an action "otherwise prohibited" by the ADEA is permitted "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).

In 1971, the Court issued its opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to address arbitrary and systemic discrimination. Based on "the specific language of Title VII of the Civil Rights Act," *Jefferson v. Hackney*, 406 U.S. 535, 549 n.19 (1972), the Court in *Griggs* held that claims could proceed on the basis of a disparate impact model of proof where there was no evidence of intentional discrimination. 401 U.S. at 431-32. Although Title VII lacked the ADEA's "reasonable factors" provision, the Court held that an employer defending an otherwise adequate disparate impact case would prevail if it established that its challenged practice was based on "business necessity." *Id.* at 431.

Following *Griggs*, multiple courts applied the Title VII disparate impact model to ADEA cases.[1] The Department of Labor guidelines issued contemporaneously with the ADEA also suggested that age discrimination claims could be based on facially age-neutral employment actions. 29 C.F.R. § 860.103(f)(1) & (2) (1986); 29 C.F.R. § 860.104(b). And for the past 21 years the EEOC interpretive guidelines have indicated that the "reasonable factors" defense in the ADEA works with the business necessity defense in a disparate impact analysis. The guidelines provide that an employer may raise the "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." 29 C.F.R. § 1625.7(d).

In 1989, the Court issued an opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989), that arguably reduced the burden of a disparate impact defendant in Title VII litigation with respect to showing "business necessity," from a burden of persuasion to a burden of production. *Wards Cove* said nothing, however, to suggest that disparate impact for Title VII or the ADEA did not *exist*, only that an employer's burden in justifying its actions was less than some courts had concluded. Courts thus continued to assume that disparate impact applied to

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[1] *See, e.g., Monroe v. United Air Lines*, 736 F.2d 394, 404 n.3 (CA7 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (CA8 1983); *Allison v. Western Union Telephone Co.*, 680 F.2d 1318, 1321-22 (CA11 1982); *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (CA9 1981); *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (CA6 1975); *United Independent Flight Officers v. United Air Lines*, 572 F. Supp. 1494, 1505 (N.D.Ill. 1983).

ADEA cases. Steven Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 258-75 (1990) (discussing prevailing view in 1990).

Partially in response to *Wards Cove*, Congress codified what it considered the pre-*Wards Cove* version of the Title VII disparate impact theory in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). "The 1991 Act, however, [left] unchanged the standards for a prima facie case." *Cota v. Tucson Police Dept.*, 783 F. Supp. 458, 472 n.14 (D.Ariz. 1992). Congress did not make any similar amendment to the ADEA. As Judge Posner recognized as late as 1992, however, "the weight of authority *** [was] that disparate impact [was] a viable doctrine under the age discrimination law." *Finnegan v. Trans World Airlines*, 967 F.2d 1161, 1163 (CA7 1992).

Congress amended the ADEA several times after *Griggs*.[2] Though it "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. at 580, Congress has never acted, however, to restrict or otherwise undermine disparate impact analysis in ADEA cases. *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 740-41 (E.D.Pa.

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[2] *See, e.g.*, Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984).

1985). To the contrary, the 1990 Congress (post-*Wards Cove*) amended the ADEA by adding the OWBPA and requiring that employers provide employees fired in reductions in force with statistical information regarding the ages of co-workers offered severance pay (and of those co-workers who were not fired). 29 U.S.C. § 626(f)(1)(H)(ii), Pub. L. No. 101-433, 104 Stat. 978 (1990); *cf.* Richard C. Mariani and Kimberly E. Robertson, Article, *Age Discrimination Litigation: RIFs, Statistics and Stray Remarks*, 64 DEF. COUNS. J. 88, 92 (1997) ("While appropriate statistical evidence may be relevant in individual disparate treatment cases, it generally carries less probative weight in those cases than it does in disparate impact cases. This is because in disparate treatment cases the central focus 'is less whether a pattern of discrimination existed at the company and more how a particular individual was treated, and why.'") (citation and quotations omitted).

In 1993, the Court issued its opinion in *Hazen Paper* and suggested in *dicta* that the disparate impact method of proving discrimination available to Title VII plaintiffs might not be available to ADEA plaintiffs. Neither the majority's opinion, nor the concurrence, indicated that disparate impact was wholly unavailable to ADEA plaintiffs—only that Title VII's version of it might not be.

B. *Adams v. Florida Power*

The Eleventh Circuit's unreported decision in this case adopts the same court's earlier decision in *Adams v. Florida Power.* App., *infra*, 2a-3a. In *Adams*, the court held that the ADEA does not under any circumstances permit disparate impact claims, and based its decision upon four grounds. First, the ADEA's exception for "reasonable

factors other than age" does not exist in Title VII. *Adams*, 255 F.3d at 1325. Second, the court determined that the ADEA exception was similar to an exception in the remedial provisions of the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1)(iv), and that this Court had interpreted the EPA's exception to preclude disparate impact claims. 255 F.3d at 1325 n.6. Third, the court found that the legislative history of the ADEA was unlike the legislative history of Title VII because the Secretary of Labor's report preceding enactment of the ADEA "recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Id.* at 1325-26. Finally, the court stated that the decision in *Hazen Paper* suggested that no disparate impact claim could be brought under the ADEA. *Ibid.*

The court concluded:

> The Second Eighth, and Ninth Circuits allow disparate impact claims under the ADEA. The First, Third, Sixth, Seventh, and Tenth do not.[3] We find the reasoning of the Tenth Circuit * * * and the First Circuit * * * persuasive. Accordingly, we find that disparate impact claims may not be brought under the ADEA, and AFFIRM.

Ibid.

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[3] This is partially incorrect. As discussed *infra* at 13, the Third and Sixth Circuits have not held that the disparate impact method of proving age discrimination is unavailable under the ADEA.

C. The Allegations in this Case

The respondent, EDS, announced a "Performance Management Process" (PMP) in 2000, as a method for assessing and ranking employees. Complaint ¶33.[4] EDS used the PMP rankings to determine compensation and to select employees for termination in the company's rolling reduction-in-force. *Id.* at ¶¶3-4. Five categories were established for rankings, with Group 1 being the top and Group 5 being the bottom. *Id.* at ¶33. The rankings were bell-curved in that only 10% of the employees could be ranked in Group 1, 15% in Group 2, 50% in Group 3, 15% in Group 4 and 10% in Group 5. *Ibid.*

Under this version of the PMP, each EDS team leader ranked subordinates individually, then the supervisors met with their immediate superiors; supervisors and their superiors then debated contributions by each employee to attempt to ensure rankings correlated to job performance. Complaint ¶33. Although the rankings purported to group EDS employees by their contributions, abilities, and needs, the percentage of employees that EDS required be placed in each category was predetermined before the employees were reviewed by their supervisors. *Id.* at ¶37(A). So—regardless of an employees' *actual* contributions, abilities and needs—employees were forced into rankings to meet the pre-determined statistical needs of the rankings model. *Ibid.* The petitioner alleged that it was unreasonable to use this forced ranking model (*ibid.*)

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[4] Since the district court dismissed the complaint for failure to state a claim, the allegations are assumed true for purposes of this petition. A copy of the complaint is included in the appendix. App., *infra*, 18a-47a.

and that EDS could reasonably meet its business needs by having employees reviewed and then determining the size of the various categories into which employees should be placed (*id.* at ¶40).

In early 2001, EDS announced that the PMP was being revised. Complaint ¶34. Under the new PMP, older employees disproportionately tended to receive lower rankings and, thus, to be terminated in RIF implementations or, if not terminated, to receive less compensation for their level of employment.[5] *Id.* at ¶¶36,41. The petitioner has alleged that, in addition to continuing the forced ranking problem of the original PMP (*id.* at ¶40), the rankings from the new PMP were based on two related, unreasonable factors that made the rankings arbitrary.

The scores that employees received were based on criteria that were both subjectively weighed *and* weighted; each supervisor subjectively assigned the numerical *values* of the listed criteria based on that supervisor's individual impression of the importance of the criteria to the job—and then the supervisor reviewed each employee and assigned scores to those values.[6] Complaint ¶¶34-35,37(B).

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[5] Approximately 55% of employees were age 40 and older before the RIF, but almost 70% of employees terminated in the RIF were age 40 and older. Complaint ¶36. The complaint does not allege whether the original PMP had a disparate impact on older employees.

[6] A copy of Mr. Thweatt's assessment, which includes the standard instructions to reviewing supervisors, was an exhibit to the complaint and is therefore in the appendix. App., *infra*, 32a-47a. Although employee assessments included both scoring and the ranking grouping in one document, and the scoring and ranking *appeared* to be done by the same individual, they were actually done separately, with scoring done at the local level and ranking done at corporate headquarters. Complaint ¶35(C).

The scores that the PMP generated were thus not merely the result of subjectivity, but subjectivity squared, and the rankings based on those scores could vary substantially without a reasonable correlation to employee performance. *Id.* at ¶¶35,37(B).

Further compounding this subjectivity of the PMP, EDS ranked each individual against all the employees that shared that individual's job code throughout the national EDS organization, fitting the local scores into the predetermined ranking percentages. Complaint ¶¶34-35,37(B). Since there were no meaningful guidelines for local scoring, the resulting national rankings were arbitrary.[7] According to the petitioner, EDS should have, at least, pre-assigned the numerical values of the criteria that individual supervisors considered for a job code. *Id.* at ¶¶35,39.

REASONS FOR GRANTING THE PETITION

In *Hazen Paper,* the Court noted that it had never resolved the question whether disparate impact analysis is available to ADEA plaintiffs: "we have never decided whether a disparate impact theory of liability is available under the ADEA * * * and we need not do so here."[8] A clear division in the circuits ensued. As the Eleventh Circuit

[7] There was, for example, no way of knowing whether an employee in Tennessee receiving a review score that caused him to rank in the third category nationally was performing at the level of an employee in California within the same job code whose score placed him in the lowest category. Complaint ¶37(B).

[8] 507 U.S. at 609-11.

acknowledged in *Adams*, its post-*Hazen* decision conflicts with the post-*Hazen* decisions of the Second, Eighth and Ninth Circuits—and aligns the court with the First, Seventh and Tenth Circuits. That split in authority persists and will continue to do so without this Court's intervention.

I. The Court of Appeals' Interpretation of the ADEA Expressly Conflicts with the Second, Eighth, and Ninth Circuits' Interpretation and Exacerbates an Existing Conflict in the Circuits

It is hard to conceive of a case presenting a clearer conflict in the circuits. In short, the decisions of the Second, Eighth and Ninth Circuits conflict with the decisions of the First, Seventh, Tenth and Eleventh Circuits: ***Compare*** *Criley v. Delta Air Lines,* 119 F.3d 102, 105 (CA2 1997) ("Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, [*Hazen*, 507 U.S. at 610], in our circuit, we have recognized such an action."); *EEOC v. McDonnell Douglas*, 191 F.3d 948, 950 (CA8 1999) ("While several of our sister circuits have held that the ADEA cannot support claims based on disparate impact * * * the law of this circuit is that disparate-impact claims are cognizable under the ADEA"); and *Frank v. United Airlines,* 216 F.3d 845, 856 (CA9 2000), *cert. denied*, 532 U.S. 914 (2001) ("We have since [*Hazen Paper*] squarely decided that a disparate impact claim is cognizable in an ADEA case.* * * [W]e again hold that a disparate impact claim is cognizable under the ADEA"), ***with*** *Mullin v. Raytheon Co.,* 164 F.3d 696, 700-01 (CA1 1999), *cert. denied,* 528 U.S. 811 (1999) (the Title VII disparate impact model announced in

"*Griggs* is inapposite in the ADEA context"); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (CA7 1998) ("disparate impact is not, at least in this circuit, a permissible theory of violation of the ADEA"); *Ellis v. United Airlines*, 73 F.3d 999, 1006-07 (CA10 1996), *cert. denied*, 517 U.S. 1245 (1996) ("disparate impact claims are not cognizable under the ADEA"); and *Adams*, 255 F.3d at 1326 ("we find that disparate impact claims may not be brought under the ADEA"). Thus three circuits have expressly held that the disparate impact method of proving age discrimination is available in ADEA cases, and four circuits have expressly held that the disparate impact method is not available in ADEA cases.

As for the remaining circuits, the Court of Appeals for the District of Columbia has so far assumed without deciding that disparate impact is available under the ADEA. *Koger v. Reno*, 98 F.3d 631, 639 (CAD.C. 1996). Judge Greenberg of the Third Circuit has independently opined that "it is doubtful that *traditional* disparate impact theory is a viable theory of liability under the ADEA." (opinion of Greenberg, J.) (emphasis added), *DiBiase v. SmithKline Beecham*, 48 F.3d 719, 732 (CA3 1995), *cert. denied*, 516 U.S. 916 (1995). The Sixth Circuit suggested in *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (CA6 1995), that disparate impact claims under the ADEA may no longer be viable in that court: "There is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory * * *. However, this circuit has stated that a disparate-impact theory of age discrimination may be possible." The Fourth and Fifth Circuits have not yet addressed the issue.

"The lower courts have split on the issue. Unless clarification is brought to this area of the law, ADEA plaintiffs seeking to challenge an age-neutral employment practice adversely affecting older workers will have different results based merely upon the federal circuit in which their suit is brought." Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?,* 69 U. CIN. L. REV. 299, 300 (2000) (footnotes omitted). To resolve whether disparate impact is an available method of proving age discrimination under the ADEA, the Court should grant certiorari.

II. The Decision of the Court of Appeals is Incorrect

A. The ADEA expressly permits claims that are not based on an employer's intent. Section 4(a)(1) of the Act concerns any actions that an employer takes because of an individual employee's age:

> It shall be unlawful for an employer * * * to fail or refuse to hire or to discharge any individual *or otherwise discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1) (emphasis added). The catchall prohibition is "or otherwise discriminate against any individual."

In contrast, Section 4(a)(2) concerns macro actions that an employer takes toward his employees if the "way" those actions are taken would "tend" to adversely affect an individual because of the individual's age:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect* his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2) (emphasis added). Section 4(a)(2) thus does not turn on—or even include—the word "discriminate." It is a result-oriented prohibition, in which the catchall speaks only of adverse "affect."

There has, however, been some debate over whether the phrase "because of such individual's age" applies to the employer's actions, in which case Section 4(a)(2) arguably requires intent, or whether that phrase applies to the tendency toward the adverse affect from those actions, in which case Section 4(a)(2) does not. *See, e.g.*, Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 842-43 (1982) (arguing for intent). But a proper grammatical analysis of the statute demonstrates that the phrase "because of such individual's age" *cannot* apply to an employer's actions—unless Congress confused singular with plural, as a pro-intent reading of Section 4(a)(2) would require:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* [because of such *individual's* age] in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect *his* status as *an* employ*ee*, because of such *individual's* age.

29 U.S.C. § 623(a)(2) (emphasis added). As written by Congress, there is no "individual" preceding "limit, segregate, or classify his employees." The necessary pro-intent

insertion of the phrase "because of such *individual's* age" after "classify his employees" thus does violence to the language of the ADEA. The only coherent reading of Section 4(a)(2) is:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any *individual* of employment opportunities [because of such *individual's* age] or otherwise adversely affect *his* status as *an* employee, because of such *individual's* age.

Ibid (emphasis added). Unless Congress made a significant drafting mistake, this provision does not require intent, and disparate impact claims should be permitted under the ADEA.

B. The requirement of reasonableness in the "reasonable factors other than age" defense only makes sense if disparate impact liability exists under the ADEA. Section 4(f)(1) permits an employer to take action that would be "otherwise prohibited * * * where the differentiation [between younger and older workers] is based on *reasonable* factors other than age." 29 U.S.C. § 623(f)(1) (emphasis added). There are two reasons why this provision *cannot* apply to disparate treatment claims. First, under disparate treatment analysis, the "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (CA11 1984). Second, an employer only engages in prohibited intentional age discrimination by knowingly treating an older worker adversely, based on the factor of age. So if an employer's "otherwise prohibited" action is intentional

discrimination, that action cannot satisfy the "reasonable factors other than age" component of Section 4(f)(1).

To give Section 4(f)(1) meaning, the ADEA must prohibit unintentional differentiations between younger and older workers, and then excuse those differentiations if they are based on reasonable factors. As Dean Player has explained:

> If age motivated the employer's action, [the prohibition] establishes prima facie liability. Now turning to [the reasonable factors exception]; it allows the action if the factor used is "reasonable" and "other than age." There is no way [the exception] could ever have an application if [the prohibitions of the ADEA are] limited to motivated decision making. If [the prohibition does] not extend beyond age motivation, there would be no need to have [the exception] because age motivated decisions could not possibly be for reasons other than age. The only way for [the exception] to have structural validity is to recognize that [the prohibition] can be violated by non-age or age-neutral factors. At this point, [the exception] would allow the employer to establish the defense that the challenged device was both neutral in terms of intent and was "reasonable."

Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act,* 31 U. RICH. L. REV. 819, 833-834 (1997). Under this analysis, every word in the ADEA provisions at issue is given effect—including the words *reasonable* and *otherwise prohibited*.

C. In *Griggs*, the Court held that language identical to Section 4(a)(2) permitted plaintiffs to proceed with

disparate impact claims. *Griggs*, 401 U.S. at 431. Some arguments against permitting disparate impact claims under the ADEA center on a belief that *Griggs* was *not* based on the language of Title VII. But the Court contemporaneously explained in *Jefferson v. Hackney*, 406 U.S. 535, 549 n.19 (1972), that *Griggs* was indeed based on "the specific language of Title VII of the Civil Rights Act." Although the Court relied in part on historical racial animus in *Griggs*, the Court has subsequently held that disparate impact applies to gender discrimination, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), even though Congress' 11th hour inclusion of sex in Title VII does not suggest that Congress considered historical animus against women in passing the Act. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989). Because the ADEA contains the same language that the Court has construed to permit disparate impact claims, disparate impact claims should be permitted under the ADEA.

D. To detect and address subconscious stereotypes, disparate impact liability should exist under the ADEA as it does under Title VII. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988). Designed to combat "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "the ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *see also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (age discrimination "based in large part on stereotypes"). Where, as here, an employer's method of classifying employees is so subjective as to be arbitrary, disparate

impact analysis is necessary to police "subconscious stereotypes and prejudices." *Watson*, 507 U.S. at 990.

III. The Question Presented is Important

There is a plethora of scholarly views regarding whether and when disparate impact analysis is applicable to the ADEA.[9] A number of post-*Hazen* writers agree on *one* topic, however: The Court should resolve the issue. As one writer observed:

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[9] For arguments favoring disparate impact liability under the ADEA, see Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Jennifer J. Clemons and Richard A. Bales, Article, *ADEA Disparate Impact in The Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000); Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299 (2000); Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997); Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507 (1995); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); *cf.* David E. Mitchell, Comment, *Recent Cases Affecting The Role of The ADEA in Protecting Older Workers*, 39 DUQ. L. REV. 437 (2001). *But see* Brendan Sweeney, Comment, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982).

> Since *Hazen*, several courts of appeal have reconsidered the validity of a disparate impact claim under the ADEA. Some have reversed prior rulings, which had allowed for ADEA disparate impact claims, while others have refused to do so without a clear directive from the Supreme Court. The Supreme Court has denied petitions for a writ of certiorari on the issue several times, leaving lower courts to speculate regarding the appropriateness of disparate impact under the ADEA.

Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability, 36 IDAHO L. REV. at 316-17. Another commentator urged:

> The intercircuit split on the issue of whether disparate impact claims should be recognized under the ADEA is a significant one. Its resolution has the potential to increase or reduce the number of successful ADEA claims. The ability to use a disparate impact theory as a basis for ADEA claims is important to plaintiffs who have difficulty obtaining direct or even circumstantial evidence of age discrimination.

Recent Cases Affecting The Role of The ADEA in Protecting Older Workers, 39 DUQ. L. REV. at 455. And still others have put it this way:

> Faced with no clear guidance from the Supreme Court and the mix of opinions of the various appellate courts, lower courts and legal commentators continue to struggle with the issue.

* * *

> [T]he authors believe that it is important that the Supreme Court provide immediate guidance to the lower courts regarding the viability of the disparate impact theory under the ADEA.

ADEA Disparate Impact in The Sixth Circuit, 27 OHIO N.U. L. REV. at 2, 18; *see also Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 ("the new division between circuits makes the issue ripe for Supreme Court resolution"); Erwin Chemerinsky, *Can Plaintiffs Make Disparate-Impact Claims in Age Discrimination Cases?*, 38 TRIAL 72 (May 2002) ("Although *Adams* was dismissed, the issue remains, and the Court will need to address it in another case in the near future.").

While there may be, as the *Hazen* concurrence stated, "substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA," the issue is far from a dead letter. The time has come for the Court to resolve whether disparate impact analysis is appropriate in ADEA litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-10047
Non-Argument Calendar

D.C. Docket No. 02-02286-CV-S-S
(Filed June 3, 2003)

JACK THWEATT, on behalf
of himself and all others
similarly situated,

Plaintiff-Appellant,

versus

ELECTRONIC DATA SYSTEMS
CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

(June 3, 2003)

Before CARNES, WILSON and KRAVITCH, Circuit Judges.

PER CURIAM:

Jack Thweatt, Jr., appeals the district court's dismissal pursuant to Fed.R.Civ.P. 12(b)(6) of his disparate impact age discrimination action against Electronic Data Systems Corporation ("EDS"). Thweatt filed his complaint under the Age Discrimination in Employment ACT ("ADEA"), 29 U.S.C. § 621 *et seq*, on behalf of a putative

class of employees alleging that EDS's performance managing process had a disparate impact on older employees. Specifically, he claimed that (1) the system for ranking employee's performance and allocating compensation was subjective, (2) employees over age forty received lower scores, and (3) based on these evaluations, older employees accounted for seventy percent of the company's reduction-in-force.

The district court dismissed the complaint for failure to state a claim, finding that it was bound by this court's decision in *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *cert. dismissed,* 535 U.S. 228 (2002), which held that disparate impact claims were not cognizable under the ADEA.

We review a district court's grant of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) de novo, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000).

On appeal, Thweatt argues that this court should reconsider its holding in *Adams*. Reviewing Congressional history leading to the passage of the ADEA and the Older Workers Benefit Protection Act of 1990 ("OWPBA"), Thweatt contends that Congress intended to include disparate impact claims, as evidenced by the statutory language "because of age" and the Department of Labor guidelines suggesting that facially-neutral employment actions could be covered by the ADEA. He claims that the similarities between Title VII and the ADEA clarify that disparate impact claims should be available under the ADEA.

"[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1306 (11th Cir. 2003); *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n. 8, 1302-03 (11th Cir. 2001). Because this court has held that the ADEA does not include liability for disparate impact claims, *Adams*, 255 F.3d at 1326, and this holding has not been overruled by this court en banc or by the U.S. Supreme Court, we are bound by the holding in *Adams*. *In re Commissioner's Subpoenas*, 325 F.3d at 1306. Accordingly, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JACK THWEATT, JR., Plaintiff,	)	
vs.	)	Civil Action No. CV-02-S-2286-S
ELECTRONIC DATA SYSTEMS CORPORATION, Defendant.	)	

ORDER

(Filed Dec. 8, 2002)

Plaintiff, Jack Thweatt, Jr., on behalf of himself and all others similarly situated, brings a single claim against defendant, Electronic Data Systems Corporation; specifically, that defendant's method of reducing its workforce through an employee ranking process has a disparate impact on employees aged 40 and older, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* Defendant has moved this court to dismiss plaintiff's claim on the ground that, in the Eleventh Circuit, "disparate impact claims may not be brought under the ADEA." *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001). Plaintiff appears to agree with defendant's analysis, stating in his memorandum of law in opposition to defendant's motion that, "[g]iven the Eleventh Circuit's decision in *Adams*, the Plaintiff

anticipates that this Court will dismiss the Complaint in this case with prejudice."[1]

Upon consideration of the pleadings, motion, and briefs, the court has determined that it would not be aided by oral argument. Accordingly, the Clerk is directed to remove this action from the motion docket scheduled to begin at 10:45 o'clock a.m. on Tuesday, December 17, 2002.

In view of the binding precedent cited above, defendant's motion to dismiss is GRANTED, and plaintiff's claim is dismissed with prejudice.

Costs are taxed to plaintiff. The Clerk is directed to close this file.

DONE this 6th day of December, 2002.

/s/ Lynwood Smith
United States District Judge

[1] Plaintiff explains that he intends to pursue "a good faith challenge to the law of the Eleventh Circuit." In view of the recent vintage of the Eleventh Circuit's decision in *Adams*, July 5, 2001, this court wishes him good luck in that endeavor.

29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation

controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under *section 1625.10, title 29, Code of Federal Regulations* (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the

burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (*42 U.S.C. 401* et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

* * *

29 U.S.C. §626 Recordkeeping, investigation, and enforcement

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph

(F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No

waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

* * *

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42 U.S.C. § 2000e-2(a)(2)

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any

individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of

production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described

in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (*21 U.S.C. 802(6)*), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [*21 U.S.C. § 801* et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

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29 U.S.C. §206(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to

(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK THWEATT, JR. on behalf of himself and all others similarly situated,

Plaintiff,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant.

CLASS REPRESENTATION

CASE NO.: CV-02-H-2286-NE

COMPLAINT

(Filed Sep. 17, 2002)

The Plaintiff, Jack Thweatt Jr., sues the Defendant, Electronic Data Systems Corporation (EDS), on behalf of himself and all others similarly situated:

JURISDICTION, VENUE, PARTIES and OVERVIEW

1. This is an action for damages under the Age Discrimination in Employment Act of 1967, as amended ("ADEA").

2. EDS is a corporation doing business in Hoover, Alabama. It was founded in 1962 and is presently the leading information technology (IT) services company in the world. EDS employs over 140,000 employees in 60 countries, and had revenues of over $21 billion in 2001

(almost 40% in the US). In the words of its chairman in EDS's 2001 report to shareholders:

> EDS grew in a time of economic decline. Your company became known as the business that keeps other businesses working. 2001 was not easy – few years are. The trust of our clients . . . our trust in each other . . . made the difference. In 2001, EDS became a $21 billion company. We enter our 40th year with:
>
> - Record revenues
> - Five consecutive quarters of base (non-GM) organic revenue growth at or above the market rate
> - Our first full year of double-digit operating margin since 1995
> - Comparable year-over-year, double-digit earnings-per-share growth
>
> For EDS, 2001 was successful and prosperous. Our backlog – business signed but not yet delivered – was greater than four times current year revenue. No competitor could make this claim.
>
> Our revenues of $21.5 billion were the highest they have ever been. We were among *Fortune* magazine's top 50 wealth-creating companies in the United States. We're proud of our financial strength. EDS maintains a high investment grade, long-term debt rating – one of the highest in our industry. Your company ended the year with a stronger balance sheet while supporting a significant surge in business growth. This rock-solid financial strength is the foundation of our success, and we're confident we can sustain it.

3. Despite its overwhelming success, EDS has been quietly terminating numerous U.S. employees as part of a rolling Reduction-In Force (RIF) that it is implementing through an employee review and ranking process called the "Performance Management Process" (PMP or "the Process") that ranks employees into one of five categories. EDS has explained the basis for the RIF to its terminated employees: "As a result of cost reduction activities, EDS has consolidated or eliminated certain functions making it necessary to reduce the size of our workforce."

4. The purported purpose of the Process is to rank individual performance and associate that rank to a "Pay for Performance" compensation policy. In actuality, the predominant purpose of the Process is to terminate employees in ensuing implementations of the RIF. The ranking also determines whether or not an individual receives a pay increase and, if so, establishes timeframes between increases and the percentage thereof. Additionally, employees ranked in the fifth, or lowest, category are considered to have demonstrated a performance problem requiring remediation.

5. The Process violates the ADEA because, as alleged below, it adversely and disparately impacts EDS's workers age 40 and over, and is based on arbitrary considerations rather than reasonable business factors.

6. The Plaintiff is a citizen of the United States and of the State of Alabama; at the time of the alleged discriminatory conduct, he was employed by EDS, working at 1876 Data Drive, Hoover, Alabama (BellSouth Birmingham Data Center).

7. The Plaintiff began his employment with EDS in 1997.

8. In January 1999 Richard Brown was named chairman and chief executive officer of EDS.

9. From 1997 until March 1999, Plaintiff was a team leader working closely with his manager on the Process; from March 1999 until October 2001, Plaintiff was a manager administering the Process. The Plaintiff was thus familiar with the Process.

10. In October 2001, the Plaintiff asked EDS to replace him as a manager and move him into the "Security Group."

11. The Plaintiff's transfer request was based on health problems linked to his stress level within EDS; he also recognized a need for an individual to take on the role in the Security Team that he proposed in his request because the Security Team – like numerous other EDS teams – was severely understaffed. The request was granted in October 2001.

12. Following his transfer, the Plaintiff was working in the EDS-BellSouth Account's Distributed Systems Management Center (DSMC) as an Infrastructure Specialist leading and managing projects encompassing a Windows NT Server Data Security Audit Compliance initiative, deployment of Quota File Sentinel (a Windows NT server add-on for disk capacity management), developing an "end to end" server build process for the center, and serving in the capacity of team member for the DSMC's Operations and Support Services' Security Team.

13. On January 31, 2001, EDS terminated the Plaintiff's employment without cause as part of the rolling implementation of its RIF; the Plaintiff was 47 years old.

14. From the date of the Plaintiff's employment by EDS, until December 2001, the Plaintiff's performance ranking had always been satisfactory or better.

15. In December 2001, the Plaintiff was ranked in the fifth, *i.e.*, worst, category, and he was selected for termination in the January 2002 implementation of the RIF based on his December 2001 ranking. (His assessment was performed in October 2001, but his ranking was either not completed, or not disclosed to the Plaintiff, until approximately mid-December 2001; a copy of the assessment and his ranking category is attached).

16. The Plaintiff timely filed a charge of age discrimination with the EEOC, subsequently received an EEOC Notice of Right to Sue, and filed this Complaint within 90 days of receipt of that Notice.

CLASS ACTION ALLEGATIONS

17. This is a class action brought by the Plaintiff on his own behalf and on behalf of others similarly situated.

18. The class the Plaintiff purports to represent is defined as:

> All salaried EDS employees and former employees who were ranked against employees in their job code in 2001 and later at the age of 40 or older, and who as a result of "Performance Management Process" rankings (a) were terminated without cause as part of EDS's reduction-in-force program; (b) had their pay reduced or not raised; or (c) otherwise suffered adverse employment action in their compensation or terms of employment.

19. The class exceeds 1000 members and is so numerous that joinder of all members is impracticable.

20. EDS's actions alleged in this Complaint are applicable to all members of the class.

21. The Plaintiff has no interest antagonistic to other members of the class.

22. The Plaintiff can adequately represent the interest of other members of the class.

23. The Plaintiff's claims are typical of claims of other members of the class who are subject to the same deprivation of their rights by the defendant as hereinafter alleged.

24. The prosecution of separate actions by individual members of the class would be impracticable because:

A) Inconsistent adjudications regarding individual members of the class would establish incompatible standards of conducts for the defendant, whose actions apply generally to any and all members of the class; and

B) Adjudications with respect to individual members of the class would be dispositive of the interest of other members not parties to the suit, since defendants' actions apply generally to any and all members to the class.

25. There are questions of law or fact common to the members of the class that predominate over questions only affecting individual members, including

A) whether the disparate impact method of proving discrimination is available under the ADEA;[1]

B) whether the Process had a significant and adverse disparate impact upon salaried workers age 40 and older within EDS who were ranked by job code; and

C) whether the Process' alleged adverse disparate impact upon older workers within EDS was based on reasonable business factors.

26. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy since the individual members were deprived of essentially the same rights by EDS's actions, and differ only in collateral aspects of their factual situations.

27. The claims of the representative party are typical of the claims of the class, and the representative party will fairly and adequately assert and protect the interests of the class.

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[1] The Plaintiff is aware of *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 122 S.Ct. 643 (2001), *cert. dismissed as improvidently granted*, 122 S.Ct. 1290 (2002), in which the Eleventh Circuit held that disparate impact was not available under the ADEA, the Supreme Court granted certiorari to resolve the circuit split on the issue, and the Supreme Court subsequently dismissed the writ as improvidently granted. The Plaintiff seeks to preserve his and the proposed Class's right to assert disparate impact claims if the Supreme Court revisits the issue again during the pendency of this case, or to seek Supreme Court review in a good faith challenge to the law of the Eleventh Circuit.

28. The maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

VIOLATION OF THE ADEA

29. EDS is an employer within the meaning of §11(b) of the ADEA, 29 U.S.C. §630(b).

30. For approximately the past two years, EDS has been conducting a rolling RIF, which it is implementing through a selection process largely based on employee rankings.

31. EDS workers are currently ranked into one of five categories and then compensated, and terminated in implementations of the RIF, based upon their rankings.

32. Prior to 2000, EDS performance reviews were based on four quartiles and each supervisor (internally called a "leader") was tasked with ranking his subordinates into each quartile with stipulations on the number of people to be placed into each quartile; there was no formal process or management tool and the rankings were at the leader's discretion.

33. In 2000, EDS announced its Performance Management Process (PMP), which was a methodology for assessing and ranking employees.

A) Five groups were established, with group 1 being the top performers and group 5 being the lowest.

B) The rankings were bell curved in that only 10% of the employees could be ranked in

group 1, 15% in group 2, 50% in group 3, 15% in group 4 and 10% in group 5.

C) Group 5 performers were either new to their position or were on an official Performance Improvement Plan due to poor performance.

D) The performance review consisted of three parts, with parts one and two comprising 50% and part three the other 50%; part 1 was based on "Shared Skills" or skills that all employees in EDS were deemed to have, part 2 was based on "Job Specific Skills", those skills directly related to job and job code, and part 3 was based on "Objectives" that were jointly established earlier in the year with an employee's leader.

E) Each skill or objective was assigned an "Importance", or weight factor, and a score. After each employee was reviewed, points were calculated and the employees were ranked accordingly. Each leader ranked his team individually, then supervisors met as a group with their directors and reviewed their lists; as a team, they debated contribution by each employee to attempt to ensure EDS' rankings correlated to job performance. This was not a difficult task because the members of the ranking teams were all in the same locale.

F) The rankings then left the area of the EDS organization where they were made and moved up to an EDS "Senior Director"; however the employees were ranked among their peers, within their local organization (of, *e.g.*, approximately 80 people, who might be physically located in multiple states).

34. In early 2001, EDS announced the PMP was being revamped. Rather than being ranked among their geographic peers, numerous employees were to be subjectively ranked among persons in their job codes throughout EDS based on criteria that were subjectively weighted by individual supervisors.

35. The Process was flawed for a variety of reasons:

A) EDS workers were subjectively reviewed on a local basis by their respective different EDS supervisors, who were located in different locations. The subjective reviews reduced the thousands of individual employees' performances to numerical scores within job codes, but the numerical value assigned to criteria leading to the score of each employee was subjectively assigned by different supervisors based on that supervisor's impression of the importance of the criteria to the job. EDS did not restrict its rankings of the employees based on those reviews to a comparison against those within a given local organization, and EDS did not require that the supervisors subjectively reviewing the employees within a given job code meaningfully confer to standardize the rankings that resulted from their reviews. Instead, EDS ranked its employees within the same job codes against one another based on subjective reviews and criteria – regardless of the location of the employee and the variability of the different supervisors' subjective perceptions.

B) Since there were no meaningful guidelines as to the range of scores to be assigned, rankings based on scores (even between leaders in

the same local organization) could vary substantially without a reasonable correlation to employee performance. (A copy of the Plaintiff's assessment, which includes the standard instructions to reviewing supervisors, is attached).

C) After the local managers reviewed and scored the individuals on their teams, the scores were submitted up the corporate ranks and returned with the ranking groupings; so employees received assessments from their managers that included both scoring and the ranking grouping in one document, though the scoring and ranking were not done by the same individual.

D) Organizationally, there were numerous delays in getting information to leaders and there was considerable confusion in establishing objectives; when reviews were ultimately conducted they were done on a rushed and haphazard basis.

36. The Process disparately impacted workers age 40 and older within EDS adversely, as they tended to receive lower rankings in the PMP and thus receive lower compensation for their level of employment, and be terminated in RIF implementations, substantially disproportionate to their presence within the company. For example, it is estimated that less than 55% of employees were age 40 and older before the RIF, but that almost 70% of employees terminated in the RIF were age 40 and older.

37. The Process was not based upon reasonable business factors but upon arbitrary considerations:

A) The rankings used in the Process supposedly grouped EDS employees by their contributions, abilities and needs, but the percentage of employees that EDS required to be placed into each category was actually predetermined before the employees were subjectively reviewed by their supervisors; so – regardless of an employees' *actual* contributions, abilities and needs – employees were placed into categories to meet the predetermined statistical needs of the rankings model, not the needs of EDS

B) Since EDS workers were subjectively reviewed and scored by their respective different EDS supervisors applying subjectively varying *criteria*, but ranked on a national basis against other employees located in different locations (who were themselves reviewed by different supervisors), the resulting rankings were wholly arbitrary; there was, for example, no way of knowing whether an employee in Tennessee receiving reviews that resulted in being placed within the third ranking category nationally was performing at the level of an employee in California within the same job code whose review resulted in placement in the lowest ranking category.

38. Given that prior to 2001, EDS ranked its employees against employees in the same location so that supervisors were conducting a more apples-and-apples comparison, a more reasonable methodology of ranking employees was obviously quite possible. To the extent EDS has any interest in company-wide uniformity, that interest can be more reasonably protected by assessment of general output from various localities and assessment of individual output within localities.

39. Rather than have individual supervisors subjectively assign the weight for the various criteria by which employees are ranked against one another (as the attached assessment reflects), it would be more reasonable for EDS to pre-assign the weights of the criteria for either all EDS employees or, at least, all EDS employees within a ranking group.

40. Rather than place employees into categories to meet the pre-determined statistical needs of the rankings model, it would be far more reasonable (and not burdensome), for EDS to meet its legitimate business needs by having employees reviewed and then determining the size of the various categories into which employees should be placed. Such a methodology would help ensure that EDS was actually selecting employees for adverse treatment based on rankings that reflected their performance rather than (as happened) selecting employees who had been arbitrarily placed into low-ranking categories to fulfill the pre-set number of employees for that category.

41. The EDS Process alleged in this Complaint deprives or tends to deprive individuals of employment opportunities because of their age, or otherwise adversely affects individuals' status as employees because of their age.

42. At all times pertinent to this lawsuit, EDS has known or reasonably should have known and understood that its employment decisions were subject to the provisions of the Age Discrimination in Employment Act.

43. Along with the members of the Class, the Plaintiff received a low ranking and was [sic] then received adverse employment action as part of the Process; they have been discriminated against because of age in violation of the ADEA.

44. As a direct result of the adverse treatment experienced in connection with the Process, the Plaintiff and the class members have experienced and will continue to experience economic damages including loss of merit increases, performance bonuses, stock options, wages, future wages, level of retirement benefits, earning capacity, and other losses associated with termination of employment, which are continuing in nature.

WHEREFORE, the Plaintiff requests:

A) Certification of the proposed Class.

B) Judgment against EDS for compensatory damages, including back pay for any and all damages Plaintiff and the Class may have suffered in loss of earning and benefits of the employment relationship, with interest, and front pay.

C) Judgment against EDS for liquidated damages.

D) Judgment against EDS for costs, attorney's fees and any other relief to which the Plaintiff and the Class are entitled.

E) Trial by jury on all issues so triable.

DATED this 17th day of September 2002.

/s/ Patrick J. Ballard
Patrick J. Ballard
BALLARD LAW OFFICE
205 20th St. N., Ste. 629
Birmingham, AL 35203
TELE: (205) 321-9600

EXHIBIT A

[The copy of this form filed with the District Court erroneously included Mr. Thweatt's handwritten notes to counsel, which have been omitted in printing.]

EDS Performance Assessment

EDS Performance Assessment 2001

Name of Person Being Assessed	JACK THWEATT
Date of Assessment	10/16/2001
Job Family	Technical Delivery
Job Code/Title	12210 Tech Dlvry Team Manager
Organization/Team Name	DISTRIBUTED SYSTEMS MGMT. CTR. 237923
Strategic Unit Number	237923
Country Code	United States
Name of Supervisor/ Manager	THOMAS SPRINGER

The EDS Performance Differentiator (Tool) is used by EDS Leaders to assess and differentiate the performance of EDS employees. The information contained herein is not intended to alter the pre-existing terms of employment between an employee and EDS, or to grant additional rights or privileges to employees.

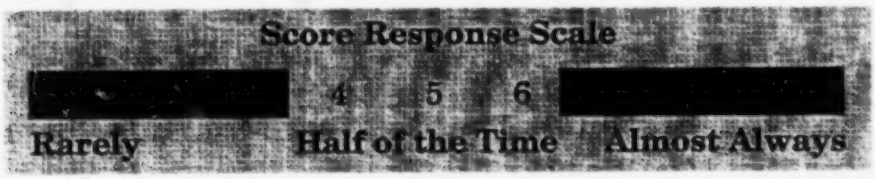
This Tool and the information it contains are the property of Electronic Data Systems Corporation ('EDS') and are made available only to employees of EDS, it subsidiaries,

and affiliates. To the extent permitted by law, EDS retains the right to change, modify, suspend, interpret, or eliminate any provision of this Tool, retroactively or proactively, at any time, with or without notice.

EDS Performance Assessment

Directions:
The importance weight is not pre-assigned. Based on the importance to the individual's job, please assign the importance scale according to the weighting scale provided (1 to 10). Use the Score Response Scale (1 to 9) to determine the frequency (score) that the leader observes the individual demonstrating that stated behavior. The upper end of the scale (7, 8 or 9) indicates that the behavior is almost always characteristic of the individual. The middle of the scale (4, 5 or 6) indicates the behavior is characteristic half the time. The lower end of the scale (1, 2 or 3) indicates the behavior is rarely characteristic of the individual.

The Shared Competencies section accounts for 20% of the overall performance score.



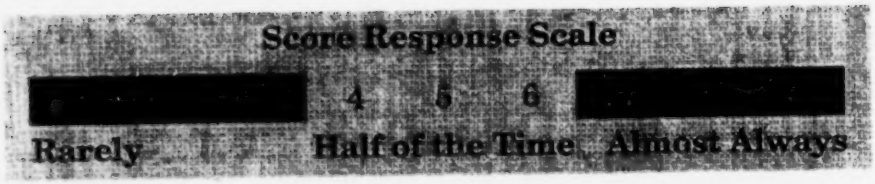
I. Demonstration of Shared Competencies
Importance weights are not pre-assigned. (Based on the importance to the individual's job, assign the importance score accordingly.)

		Importance (Max 10)	Score (1-9)
1.	Communication	10	7
2.	Problem Solving	8	4
3.	Relationship Building	8	4
4.	Teamwork	8	5
5.	Innovation & Change	7	4
6.	Planning & Implementing	9	3
7.	Personal Management	8	3
8.	Market Insight	7	4

EDS Performance Assessment

Directions:
The importance weight is not pre-assigned. Based on the importance to the individual's job, please assign the importance scale according to the weighting scale provided (1 to 10). Use the Score Response Scale (1 to 9) to determine the frequency (score) that the leader observes the individual demonstrating that stated behavior. The upper end of the scale (7, 8 or 9) indicates that the behavior is almost always characteristic of the individual. The middle of the scale (4, 5 or 6) indicates the behavior is characteristic half the time. The lower end of the scale (1, 2 or 3) indicates the behavior is rarely characteristic of the individual. The Job Specific Skills can be found in the attached file. Please locate the job code and transfer the appropriate skills for the employee.

The Job Specific Skills and Supplemental Skills (if any) section accounts for 30% of the overall performance score.



II. Demonstration of Job Specific Skills

Importance weights are not pre-assigned. (Based on the importance to the individual's job, assign the importance score accordingly.)

		Importance (Max 10)	Score (1-9)
1.	Demonstrates Business Acumen appropriate to a(n) Tech Dlvry Team Manager	9	6
2.	Demonstrates Decisiveness appropriate to a(n) Tech Dlvry Team Manager	9	3
3.	Demonstrates People Focus appropriate to a(n) Tech Dlvry Team Manager	7	4
4.	Demonstrates Leadership appropriate to a(n) Tech Dlvry Team Manager	8	4
5.	Demonstrates Execution appropriate to a(n) Tech Dlvry Team Manager	10	4
6.	Demonstrates Client Focus appropriate to a(n) Tech Dlvry Team Manager	8	3
7.	Demonstrates Integrity appropriate to a(n) Tech Dlvry Team Manager	7	3
8.	Demonstrates External Acumen appropriate to a(n) Tech Dlvry Team Manager	7	3

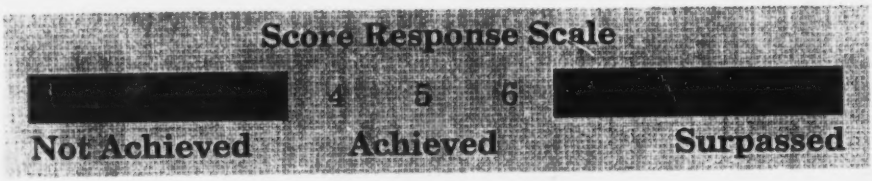
9.	Demonstrates Knowledge Management appropriate to a(n) Tech Dlvry Team Manager	7	4
10.	Demonstrates Strategic Direction appropriate to a(n) Tech Dlvry Team Manager	6	3

EDS Performance Assessment

Directions:

The Objective section requires the leader (with input from the employee as applicable) to document the business and learning objectives for the assessment period. Business objectives should align with the team, account and unit business plans and objectives. For an objective to be included in the overall performance score, an importance weight must be assigned by the leader. Use the Objective Response Scale provided to score the section. Use the upper end of the scale (7, 8 or 9) if the objective has been surpassed (significantly ahead of schedule, under budget, and delights the customer). Use the middle of the scale (4, 5, or 6) if the objective has been achieved (on time, within budget and scope and meets the customer's needs). Use the lower end of the scale (1, 2 or 3) if the objective has not been met (behind schedule, over budget and minimal customer satisfaction). Us [sic] the space following each item to write a brief (1 or 2 sentence) justification of your assessment.

The Objectives section accounts for 50% of the overall performance score.



III. Objectives

Importance weights are not pre-assigned. (Based on the importance to the individual's job, assign the importance score accordingly.)

		Importance (Max 10)	Score (1-9)
1.	Objective: To: Meet Performance & Change Management targets as defined by the Desktop Tower So that: Service Delivery to BellSouth is met or exceeded Achieve By: 12/31/2001 Standards: 1) Severity 1 cases resolved on average of less than 2 hours each month 2) Severity 2 cases resolved on average of less than 3 hours each month 3) Severity 3 cases resolved on average of less than 7.5 business hours each month	10	6

4) Severity 4 cases resolved on average of less than 12 business hours each month

5) Severity 5 cases resolved on average of less than 40 business hours each month

6) Percent commitment on SLA met on all cases to be equal to or better than 85% each month

7) MAC requests completed on average within 5 working days or less

8) All projects complete as quoted for schedule and price

Measurement:
1) Desktop Daily Operational Report

2) Additional reports upon availability

2.	Objective: To: Implement NTI Password aging So that: BellSouth Corporate Security Standard is met Achieve By: 6/30/2001 Standards: 1) Identify process for capturing NTI accounts with variance for no password aging 2) Define tool requirements to automate adding password aging where appropriate and submit tool request	5	5

3) User Acceptance Testing of tool as defined in Standard 3

4) Implementation of process and tool based on above standards

5) Week to Date, Month to Date and Year to Date reporting of account activity where password aging was added

Measurement:
1) Completion of standards 1 & 2 by February 28, 2001

3. Objective: 7 3

To:
Implement TNG Autopaging for Security Breaches

So That:
Bellsouth Corporate Security Standards are met

Achieve By:
6/30/2001

Standards:
1) Identification of security events to be captured in TNG

2) Identification of servers to be monitored for security events outlined in #1

3) Identification of pagers to activate upon security beaches

4) Definition of tool requirements as appropriate and submit tool request

5) User Acceptance Testing of tool as defined in Standard 4

6) Documentation of internal processes to follow upon security breach notification

7) Implementation of TNG autopaging

8) Week to Date, Month to Date and Year to Date reporting of security breach events

Measurement:
1) Completion of standards 1-4 by March 31, 2001

Complete
2) Completion of standard 5-8 by June 30, 2001

4. Objective: 5 5

To:
Delete inactive NTI accounts

So that:
BellSouth Corporate Security Standards are met

Achieve By:
12/31/2001

Standards:
1) Identify source of data to provide list of inactive NTI accounts

2) Identify process for deleting inactive NTI accounts based on data source

3) Define tool requirement for deleting inactive NTI accounts from list & submit tool request

4) User Acceptance Testing of tool as defined in Standard 3

5) Implementation of process and tool based on above standards

6) Development of Month to Date & Year to Date NTI Inactive Account Deletion Reports

Measurement:
1) Completion of standards 1, 2 & 3 by June 30, 2001

2) Completion of standard 4 & 5 by September 30, 2001

3) Process, tool, data, and report validation by November 31, 2001

4) Full implementation by December 31, 2001

5. Objective: 8 5

To:
: Support Desktop Tower Goal of moving 20% of work being completed by Field Support into the DSMC

So that:
That: Increases in customer service delivery and internal efficiency are recognized

Achieve By:
4/30/2001

Standards:
1) Complete migration of backup & restore functions from Field Support by 1/31/012) 2. Migrate remaining Field Support servers to OSS Account Management, Backup/Restore, and Security by March 31, 2001

Measurement:
1a) Implementation of migration project plan

1b) Migration Status Reports

1c) Project Completion Acceptance notification from Billy Butler

2a) Implementation of migration project plan

2b) OSS - Weekly Migration Status Reports detailing "Total Remaining Servers, Total Target Servers, Server Migration Schedule"

6. Objective: 7 3

To:
Implement TNG Autopaging for back-up and restore failures on supported servers

So that:
Failures are readily recognized and addressed

Achieve By:
3/31/2001

Standards:
1) Document and verify all servers to be monitored

2) Identify failure traps to be captured

3) Identify pagers for activation

4) Implementation of TNG Autopaging

Measurement:
1) Completion of standards 1, 2, and 3 by February 15, 2001

2) Completion of standard 4 by March 31, 2001

7. Objective: 8 3

To:
Implement Backup/Restore Failure Reports

So that:
Failures are documented, root cause is determined, and corrective action defined and implemented

Achieve By:
3/31/2001

Standards:
1) Document and verify all servers whose log files are to be scanned

2) Identify process for scanning Backup/Restore log files

3) Define tool requirements for automation of log file scanning & submit tool request

4) User acceptance testing of tool as defined in standard 3

5) Implementation of process and tool based on above standards

6) Generation of Week to Date, Month to Date and Year to Date reports

a. "Backup Report"

i. Number of backups performed on a weekly basis

ii. Number of failures per week

iii. Identification of failed server and root cause of failure

iv. Documentation of corrective action performed

b. "Restore Report"

i. Number of restores performed on a weekly basis

ii. Time required per restore

iii. Number of restore failures per week

iv. If EMC storage (off site), time required to obtain tape/s, load, and perform restore

Measurement:
1) Completion of standards 1-2 by 1/31/01

2) Completion of standard 3 by 2/15/01

3) Completion of standards 4-6 by 3/31/01

8. Objective: 5 4

To:
Develop Security and Backup/Restore Team Time Studies

So that:
Resource requirements can be clearly identified and measured

Achieve By:
2/15/2001

Standards:
1) Identification of tasks performed each day by team

2) Identification of time spent per task each by per team member

3) Generation of summary resource report

4) Extrapolation of summary report to include on-going and pending projects

Measurement:
Completion of standards

9. Objective: 7 4

To:
Average 80 hours training per year per OSS Team Member

So that:
Contract training requirements are met

Achieve By:
12/31/2001

Standards:
1) Technical and Professional training as specified in Individual Development Plans

Measurement:
1) Completion of standards

2) Overall team average of 80 hours training achieved by years end as reported in Train Tracks

10. Objective: 7 5

To:
Meet all project milestones as established and reported by the QSC

So that:
: the pursuit of ISO certification is maintained

Achieve By:
12/1/2001

Standards:
1) Full participation in all scheduled ISO meetings and training

2) Successful completion of any audits

3) Full compliance with set standards

Measurement:
1) Completion of standards

EDS Performance Assessment

IV. Summary

Strengths:

Development Needs:

Performance Summary:
(Provide a narrative summary for the employee)

Your Performance group: Major Development Required

Manager Acknowledgement of Delivery:

_____ Date: _____

Employee Acknowledgement of Delivery:

_____ Date: _____

My signature above acknowledges that my leader and I have discussed the content of this Assessment. My signature is merely acknowledging the receipt of the informatoin and does not indicate my agreement or disagreement with with [sic] ***this assessment or my grouping level.***

In the United States – Please keep a signed copy of this document for three years after the employee has separated from EDS. In the event of a transfer please forward a copy to the gaining manager. For countries outside of the United States, please follow country specific procedures as communicated by your local Human Resources Department.